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in the
Supreme Court
of the
United States

OCTOBER TERM, 1969

No. _____

MORTIMER NORMAN KORAN,

Petitioner

vs.

STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Petitioner prays that a writ of certiorari issue to review the decision and judgment of the District Court of Appeal of Florida, Fourth District.

OPINION BELOW

The Opinion of the District Court of Appeal of Florida, Fourth District, affirming Petitioner's conviction, is reported in 219 So. 2nd 735, (Fla. App. 1968), and may be found in Appendix J.

GROUNDS FOR JURISDICTION

The Judgment of conviction of the Court of Record in and for Broward County, Florida was entered on November 3, 1967 (Appendix D), and the Sentence was entered on November 21, 1967. (Appendix G). The decision and Judgment of the District Court of Appeal of Florida, Fourth District, affirming Petitioner's conviction, was entered on February 14, 1969 (Appendix J), and said Court's Order Denying Petition For Rehearing was entered on March 21, 1969. (Appendix K). The Supreme Court of Florida denied a Petition For Writ Of Certiorari on June 9, 1969 (Appendix L), and further denied a Petition For Rehearing on July 11, 1969. (Appendix M).

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3), because a title, right, privilege or immunity claimed under the Constitution of the United States was denied by the District Court of Appeal of Florida, Fourth District.

QUESTIONS PRESENTED

QUESTION ONE

THOUGH THE ELECTRONIC SURVEILLANCE OF PETITIONER OCCURRED PRIOR TO THE DECISION IN KATZ VS. UNITED STATES ON DECEMBER 18, 1967, DID THE INTRODUCTION INTO EVIDENCE OF TAPE RECORDINGS OF ORAL AND TELEPHONE CONVERSATIONS OF PETITIONER, WHEN PETITIONER ELECTED NOT TO TESTIFY AT HIS TRIAL, CONSTITUTE A VIOLATION OF HIS RIGHTS UNDER BOTH THE FOURTH AND FIFTH AMENDMENTS?

QUESTION TWO

DID THE ADMISSION INTO EVIDENCE OF THE FRUITS OF A WARRANTLESS SEARCH, NOT INCIDENTAL TO THE ARREST, BASED ON A CONSENT BY PETITIONER DURING CUSTODIAL INTERROGATION, WHEN PETITIONER WAS NOT ADVISED OF HIS RIGHT TO CONSULT WITH AN ATTORNEY PRIOR TO GIVING SUCH CONSENT, VIOLATE PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual

service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensations.

AMENDMENT XIV

SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF FLORIDA

SECTION 12—DOUBLE JEOPARDY:
SELF-INCRIMINATION:
EMINENT DOMAIN:
RIGHT TO WORK

No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall

private property be taken without just compensation. The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

SECTION 22—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and thing or things to be seized.

TITLE 28

UNITED STATES CODE

SECTION 1257 (3)

Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: By Writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

In June, 1966, Petitioner was a printer engaged in the printing business in Hallandale, Broward County, Florida. A United States Secret Service Agent, Arthur Rivers, while conducting an investigation of counterfeit currency, devised a plan by which he would attempt to entice Petitioner into printing counterfeit currency and Florida drivers' licenses. Pursuant to Rivers' plan, an informer, one Richard Schatzabel, was equipped with an electronic eavesdropping device on his person, and was sent to Petitioner's place of business in Hallandale to discuss the above counterfeiting plan. Their conversation was overheard and recorded by Rivers, who stationed himself nearby but outside Petitioner's premises. (R. 19-22).

The next day, at Rivers' instructions, Schatzabel telephoned Petitioner at his place of business. The telephone used was equipped with an electronic eavesdropping device, and the conversation was overheard by Rivers and likewise recorded. (R. 30-33). Schatzabel arranged a meeting between Petitioner and Rivers, who acted in an undercover capacity as a buyer of counterfeit currency and drivers' licenses. Rivers, in his undercover capacity and also equipped with an electronic eavesdropping device on his person, met with Schatzabel and Petitioner under the Haulover bridge in Dade County, Florida, and two of their conversations were overheard and recorded by other law enforcement officers stationed nearby but out of view, who recorded same. (R. 23, 24, 77-78, 107-110).

During the next few days, Rivers initiated several telephone calls to Petitioner at his place of business, and Rivers' telephone was equipped with an electronic eavesdropping device. These telephone conversations were also recorded without Petitioner's knowledge or consent. A meeting was arranged during these telephone conversations for the delivery of counterfeit drivers' licenses from Petitioner to Rivers at the same Haulover bridge in Dade County, Florida. (R. 24-26).

At this meeting, the oral conversations between Rivers and Petitioner were again overheard and recorded by other police officers and agents. Petitioner was arrested at this meeting and charged by the Dade County authorities with "unlawful possession of counterfeit drivers' licenses". (R. 28-29, 79, 87, 116)

At the scene of the arrest, a power station in Dade County, Florida, a simulated arrest and detention was made upon Rivers. Petitioner was intensely interrogated in the power station by not only several other United States Secret Service Agents, who were in attendance, but also by a State of Florida Highway Patrolman and by a City of Miami Police Officer. During this intensive interrogation by the many law enforcement agents, Petitioner was asked if he had any objection to a search of his car, which was at the scene in Dade County, his home in Broward County, and his printing shop, which was several miles away in Hallandale, Broward County, Florida. The testimony of the agents indicated Petitioner was advised generally that he had the right to an attorney, but he was not specifically advised by any of the law enforcement officers that he had the right to consult an attorney prior to giving his consent to such a search. Under the

circumstances then existing, Petitioner stated he had no objection to the proposed warrantless search and signed what appeared to be a consent to said search. (R. 137, 164-165, 195-196)

All of the law enforcement officers at the scene and Petitioner then proceeded in several different cars from the power station in Dade County, Florida, to Hallandale in Broward County, Florida, and commenced a search of Petitioner's place of business. During such search, numerous sheets of paper and a "blanket" from Petitioner's offset printing press were seized, and were later identified by the prosecution's expert witness as the paper and "blanket" upon which the counterfeit drivers' licenses were printed. (R. 172, 211, 254). Petitioner was then charged by the Broward County officials with "making . . . counterfeit operators' or chauffeurs' licenses". (Appendix A).

Petitioner filed his Motion To Suppress, among other matters (1) the oral conversations between Schatzabel and Petitioner at Petitioner's place of business, (2) the oral conversations between Rivers, Schatzabel and Petitioner not at Petitioner's place of business and (3) the telephone conversations between Schatzabel and Rivers on the one hand, and Petitioner, which calls were made to, not from, Petitioner at his place of business, and (4) the physical evidence seized from Petitioner's place of business in Hallandale, Broward County, Florida as the result of the warrantless search. (Appendix B).

The Trial Court denied Petitioner's Motion To Suppress as to all matters, and at the Trial, testimony as to all oral and telephone conversations of Petitioner with

Schatzabel and Rivers were admitted into evidence, as well as tape recordings of all of such conversations, which were played to the jury over Petitioner's objections. (R. 102-103, 105-106). In addition, the physical evidence seized from Petitioner's place of business in Hallandale, Broward County, Florida were also introduced into evidence over Petitioner's objections. (R. 169, 209-210, 224-225, 245).

Petitioner did not testify at either the Motion To Suppress or at the Trial, nor was the informer, Schatzabel, produced as a witness by the prosecution at either the Hearing on the Motion To Suppress, or at the Trial.

Petitioner was found guilty by the jury and sentenced to a term of eight years in the state prison. (Appendix G). From this Judgment and Sentence, Petitioner filed his Notice of Appeal to the District Court of Appeal of Florida, Fourth District. (Appendix H)

As a result of the same electronic surveillance herein, Petitioner was charged by the United States authorities for various offenses related to counterfeit currency. Petitioner was tried and convicted in the United States District Court for the Southern District of Florida, and the identical tape recordings were admitted into evidence by the Trial Court. The United States Court of Appeals for the Fifth Circuit affirmed the conviction in **Koran vs. the United States of America,** 408 F. 2nd 1321, (5th Cir. 1969), (Appendix O), and a petition for a writ of certiorari was filed in the United States Supreme Court on May 23, 1969, and is now pending.

As a further result of the same electronic surveillance herein, Petitioner was charged, tried and convicted in the Criminal Court of Record in and for Dade County, Florida, and the identical tape recordings again were admitted into evidence by the Trial Court. The District Court of Appeal of Florida, Third District, affirmed the conviction in **Koran vs. State of Florida,** (Fla. App. 1968), 213 So. 2nd 735, (Appendix N), and a petition for a writ of certiorari also was filed in the United States Supreme Court on May 23, 1969, and is now pending.

Substantially, the same question as to the use of evidence secured by electronic eavesdropping is involved in all three cases.

HOW THE FEDERAL QUESTIONS WERE RAISED

Prior to trial, the federal questions were raised in Petitioner's Motion To Suppress such evidence which was obtained contrary to the Constitutions of the State of Florida and of the United States (Appendix B). The Trial Court denied the Motion To Suppress with regard to all evidence (Appendix C).

The federal questions were raised during trial when the Trial Court admitted into evidence testimony as to the oral and telephone conversations of Petitioner, which were overheard by electronic eavesdropping devices; and further admitted into evidence tape recordings of such conversations, and permitted them to be played to the jury, all over Petitioner's objections and renewal of his Motion To Suppress (R. 102-103, 105-106). In addition, the physical evidence seized from Petitioner's place of busi-

ness, as the result of a warrantless search, were also admitted into evidence, all over Petitioner's objections. (R. 169, 209-210, 224-225, 245).

The federal questions were raised after trial in Petitioner's Motion For New Trial (Appendix E), which was denied by the Trial Court (Appendix F).

The federal questions were raised in Petitioner's Assignments of Error filed in the District Court of Appeal, Fourth District (Appendix I), in the Brief of Appellant, and in the Petition For Rehearing in said Court, which was denied on March 21, 1969 (Appendix K).

The federal questions were likewise raised in the Petition for Writ of Certiorari, filed in the Supreme Court of Florida, which was denied on June 9, 1969, (Appendix L), as well as in the Petition For Rehearing in said Court, which was denied on July 11, 1969 (Appendix M).

REASONS FOR GRANTING THE WRIT

QUESTION ONE

There is now no question that the Government's electronic activities in the instant case were clearly violative of not only Petitioner's constitutional rights, but also of federal statutes. Petitioner's conviction undoubtedly would have been set aside under **Lee vs. State of Florida,** 392 U.S. 378, (1968), that such interception was in violation of Section 605 of the Federal Communication Act, but for the prospective application of such rule in **Fuller vs. State of Alaska,** 383 U.S. 80, (1969).

In addition, Petitioner's conviction also undoubtedly would have been set aside under the doctrine set forth in **Katz vs. United States,** 389 U.S. 347, (1967), that such electronic surveillance was in violation of rights under the Fourth Amendment, but for this Court's pronouncement in **Desist vs. United States**, 394 U.S. 244 (1969), that **Katz** also "should be accorded only prospective application."

Even though the electronic surveillance herein occurred prior to **Katz** on December 13, 1967, there are major factual differences between the present case and **Desist,** wherein the harsh and unjust rule of **Desist** should not be applicable, primarily because of the Fifth Amendment question.

Desist was not clear as to whether the defendants therein did or did not testify in their own behalf, other than this Court's pronouncement "an important part of the Government's evidence consisted of tape recordings of conversations among several of the Petitioners in a New York City hotel room." The lower Court, however, indicated that several of the defendants offered affirmative testimony and evidence, including an alibi, which may well have included direct testimony by the defendants.

Petitioner contends the Fifth Amendment demands a defendant should "not be compelled in any criminal case to be a witness against himself." To give full meaning to the rights created under such Amendment, the illegally seized tape recordings of oral and telephone conversations of Petitioner, which contained many incriminating statements by Petitioner, should not have been introduced into evidence and played to the jury, until and unless Peti-

tioner waived his constitutional right not to testify at the trial. Once Petitioner waived his constitutional right and did elect to testify, the tape recordings might then be admitted into evidence for the sole purpose of discrediting Petitioner.

If the above were not the rule, the Courts are merely giving lip service to a defendant's Fifth Amendment rights, in that the practical effect, as was the case here, would be to permit the jury to actually hear a defendant's own incriminating words, from his own mouth, convict him, when he has not yet had the opportunity to make a decision whether or not to waive his constitutional right against self incrimination. The prosecution obviously waives the defendant's rights for him.

Even prior to **Katz**, this Court was concerned with this problem. In **Berger vs. State of New York**, 388 U.S. 41, (1967), Justice Douglas, in his concurring opinion, stated at page 67:

> ". . . For the Fourth Amendment and Fifth come into play when the accused is 'the unwilling source of the evidence' . . . there being no difference 'whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers . . .
>
> " . . . In short, I do not see how any electronic surveillance that collects evidence or provides leads to evidence, is or can be constitutional under the Fourth and Fifth Amendments . . ."

This Court has gone to great extreme to extend Constitutional rights of a defendant outside the courtroom by limiting the use of extrajudicial statements made by such defendant. **Miranda vs. State of Arizona,** 384 U.S. 436, (1966). Inside the courtroom, a defendant should receive the same protection of his constitutional rights.

Further, this Court in **Linkletter vs. Walker,** 381 U.S. 618, (1965), discussed the retrospective application of new criminal rules, and stated at Page 639:

> ". . . finally in each of the three areas in which we have applied our rule retrospectively, the principle that we applied went to the **fairness of the trial** . . ." (Emphasis Added)

But, in **Desist,** this Court stated the exclusionary rule under the Fourth Amendment is but a "procedural weapon that has no bearing on guilt" and "the fairness of the trial is not under attack."

Petitioner contends if a defendant elects not to testify, the prosecution has the burden of carrying forward the prosecution without the defendant's own voice and words making up the primary evidence for his conviction. It is respectfully submitted that the "fairness of the trial" is clearly under attack if such a procedure is used.

Since **Desist,** this Honorable Court has granted certiorari to the United States, **United States vs. White,** 394 U.S. 957, (1969), wherein the Seventh Circuit reversed a conviction under almost identical factual circumstances as here. Since the disposition of this case may be deferred until disposition of **White,** Petitioner would respectfully

comment on the government's prime contention there, which is also the prime contention here, that one party may consent to such electronic eavesdropping, and consequently, a defendant's constitutional right of privacy may be in fact waived by another.

Petitioner submits that if such were the holding of this Court, the development of the law with respect to **Miranda,** and finally **Katz,** would be of no practical meaning to a defendant. Petitioner contends only a defendant can waive his own constitutional rights.

QUESTION TWO

The facts are not in dispute that the search of Petitioner's place of business, several miles away from the place of arrest and in another county, was warrantless, but proceeded on a consent given by Petitioner. The facts are also not in dispute that Petitioner was given, during custodial interrogation, warnings as to his right to an attorney, but no one gave Petitioner a specific instruction that he was entitled to the advice of an attorney prior to consenting to a warrantless search.

If the prosecution now seeks to benefit from the warrantless search and introduce into evidence the fruits of that search, the prosecution must show by clear and positive testimony Petitioner voluntarily, knowingly and intelligently consented to such search, and that there was no duress or coercion, actual or implied. See **Judd vs. United States** 190 F. 2nd 649 (1951), wherein the Court stated at Page 651:

> "The burden on the Government is particularly heavy in cases where the individual is under arrest. Non-resistance to the orders or suggestions of the police is not infrequent in such a situation; true consent free of fear or pressure is not so readily to be found . . . In fact, the circumstances of the defendant's plight may be such as to make any claim of actual consent 'not in accordance with human experience' and explainable only on the basis of 'physical or moral compulsion'."

The philosophy of the **Judd** case was completely adopted by Florida in **Telavera vs. State of Florida,** 186 So. 2nd 11 (1966).

Judd was broadened in **United States vs. Blalock,** 255 F. Supp. 268, wherein the Court amplified "consent" at Page 269:

> "First, the consent must have been 'intelligent.' Obviously, the requirement of an 'intelligent' consent implies that the subject of the search must have been aware of his rights, for an intelligent consent can only embrace the waiver of a 'known right' . . . Certainly, one cannot intelligently surrender that which he does not know he has . . . The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth . . ."

Since **Blalock,** many other Courts have had serious reflections upon the problems raised, mainly, whether or not the implications of **Miranda** suggest that the current law of consent and searches no longer satisfies this Honorable Court's intense concern for pretrial protection of privileges established by the Bill of Rights. Though **Miranda** involved waiver of Fifth and Sixth Amendment rights, it was founded upon the premise that no Constitutional rights should be relinquished in the absence of knowledge. The following cases have applied this doctrine to consent searches. **United States vs. Lewis,** 274 F. Supp. 184 (1967); **United States vs. Nikrasch,** 367 F. 2nd 740 (1966); **United States vs. Shrapshire,** 271 F. Supp. 521 (1967); **Rosenthall vs. Henderson,** 389 F. 2nd 514 (1969) and **United States vs. Moderacki,** (U.S.D.C. Del. 2), 2 Cr. L. 2403, (2/13/68).

Miranda presumes the existence of coercion whenever an individual being questioned has been "deprived of his freedom of action". **Blalock** reaffirms the value of knowledge and adds the specific requirements of a warning. Together **Miranda** and **Blalock** require, as a prerequisite to every consent and search, a waiving sufficient both to apprise an individual of his constitutional right to prevent a search, and to make him understand the consequences of waiving that privilege. The burden of education is upon the police and is not discharged by rendering advice as to the mere existence of constitutional rights.

An individual's waiver of these rights are only intelligent and knowledgable when he is made aware of the legal consequences of his decision, and it is obvious that the right to counsel is the most important included in the Miranda warning. See the leading article in the field, cited by many Courts, **67 Columbia Law Review 130,** Janu-

ary 1967-Consent Searches: A Reappraisal After Miranda vs. Arizona, wherein the writer states at page 155:

> "It is evident that right to counsel is itself the most important single right included in Miranda warnings. Indeed the role which counsel serves as repository of knowledge necessary to the making of intelligent decisions to waive an exercise of constitutional privileges is so fundamental that it might be argued that presence of counsel is an absolute prerequisite to any valid consent to search."

CONCLUSION

Petitioner respectfully submits that even without the application of **Katz** and **Desist**, pre-**Katz** law clearly recognized that the illegally obtained electronic eavesdropping evidence, used to convict Petitioner, constituted a violation of his constitutional rights under the Fourth, Fifth and Fourteenth Amendments, and that the illegally obtained physical evidence, obtained as the result of a warrantless search, also constituted a violation of his rights under the Fourth Amendment.

Respectfully submitted,

H. ROBERT KOLTNOW &
GERALD KOGAN
Attorneys for Petitioner
1201 Biscayne Building
19 West Flagler Street
Miami, Florida

By_____

APPENDIX

APPENDIX A

IN THE COURT OF RECORD OF BROWARD COUNTY, IN AND FOR BROWARD COUNTY, STATE OF FLORIDA, THE 8TH DAY OF JULY, 1966.

CASE No. 66-10011

THE STATE OF FLORIDA

vs.

MORT NORMAN KORAN

INFORMATION FOR COUNTERFEITING DRIVER'S LICENSES

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

ALFRED J. SKAF, Acting County Solicitor for the Court of Record of Broward County, State of Florida, charges that

MORT NORMAN KORAN

on the 30th day of June, A. D. 1966, in the County and State aforesaid did then and there unlawfully print, photograph or in some manner make or execute an engraved photograph, print or impression in the similitude of the operator's or chauffeur's licenses issued by the Department of Public Safety, the county judges, or their duly authorized agents, with the intent to sell, issue, publish or utter the same, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

s/ ALFRED J. SKAF
Acting County Solicitor,
Broward County, Florida

COUNTY OF BROWARD,
STATE OF FLORIDA,

Personally appeared before me, ALFRED J. SKAF, Acting County Solicitor for the Court of Record of Broward County, Florida, who, being first duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged.

s/ ALFRED J. SKAF
Acting County Solicitor,
Broward County, Florida

Sworn to and subscribed before me this 8th day of July, A. D. 1966.

W. B. DeMilly
Clerk of the Court of Record,
Broward County, Florida

A TRUE COPY
COURT OF RECORD SEAL

By s/ Miriam N. Raye
Deputy Clerk.

To the within Information, defendant pleaded _____

W. B. DeMilly
Clerk of the Court of Record,
Broward County, Florida

By_____
Deputy Clerk.

APPENDIX B

IN THE COURT OF RECORD, IN AND FOR BROWARD COUNTY, FLORIDA

NO. 66-10011

STATE OF FLORIDA,

Plaintiff,

vs.

MORTIMER NORMAN KORAN,

Defendant.

MOTION TO SUPPRESS

COMES NOW the Defendant, MORTIMER NORMAN KORAN, by and through his undersigned attorney, and files this his Motion to Suppress any and all evidence which the prosecution intends to introduce against the Defendant in the forth coming trial of the above entitled cause, which evidence was obtained as a result of an illegal arrest and/or unlawful search and seizure contrary to the Constitution of the State of Florida and the Constitution of the United States of America.

H. ROBERT KOLTNOW and
GERALD KOGAN
Attorneys for Defendant
1201 Biscayne Building
Miami, Florida 33130

BY: Gerald Kogan
GERALD KOGAN

I HEREBY CERTIFY that a copy of the foregoing Motion to Suppress was mailed to ANGELINE G. WEIR, County Solicitor, 201 S. E. 6th Street, Ft. Lauderdale, Florida, this 23rd day of June, 1967.

Gerald Kogan
GERALD KOGAN

APPENDIX C

IN THE COURT OF RECORD IN AND FOR BROWARD COUNTY, FLORIDA.

NO. 66-10011

STATE OF FLORIDA

vs.

MORT NORMAN KORAN

ORDER

THIS CAUSE coming on to be heard upon the Defendant's Motion to Suppress Evidence, and the Court having taken testimony and heard argument, it is, upon consideration,

ORDERED and ADJUDGED that the Defendant's Motion to Suppress Evidence be, and the same is hereby, denied.

DONE and ORDERED at Fort Lauderdale, Broward County, Florida, this 19th day of July, 1967.

RAYMOND J. HARE
JUDGE, COURT OF RECORD

A TRUE COPY

Copy furnished:

B. Paul Pettie, Asst. County Solicitor
Gerald Kogan, attorney for Defendant

APPENDIX D

On the 3rd day of November, 1967, excerpts from Court of Record Minute Book 181, Page 541, reciting the Judgment of the Court in that cause styled STATE OF FLORIDA vs. MORT NORMAN KORAN, Case No. 66-10011, recorded in words and figures as follows:

". . . . Whereupon, the Court proceeded as follows:

> You, Mort Norman Koran, having been found guilty by the Jury of the crime of Counterfeiting Driver's License, the Court now adjudges you to be guilty of said crime. It is,
>
> Ordered and Adjudged that imposition of sentence be hereby deferred until Tuesday, November 21, 1967 at 11:00 A. M., and you are hereby released on the same bond pending Sentencing.
>
> RAYMOND J. HARE
> Judge . . . ."

APPENDIX E

IN THE COURT OF RECORD, IN AND FOR BROWARD COUNTY, FLORIDA.

NO. 66-10011

STATE OF FLORIDA,

Plaintiff,

vs.

MORTIMER NORMAN KORAN,

Defendant.

MOTION FOR NEW TRIAL

COMES NOW the Defendant, MORTIMER NORMAN KORAN, by and through his undersigned attorneys, and moves this Honorable Court for a new trial on the following grounds:

1. That the verdict is contrary to the law.

2. That the verdict is contrary to the evidence.

3. That the verdict is contrary to the law and the evidence.

4. That the Court erred in denying the Defendant's Motion to Suppress all evidence, taken as the result of an illegal search and seizure, and introduced against the Defendant in the trial of this cause, including confessions, statements against interest, electronic recordings of telephone and other conversations, and all evidence seized from the Defendant's place of business in Hallandale, Florida.

5. That the Court erred in denying the Defendant's Motion for a Directed Verdict of Acquittal both at the close of the State's case and at the conclusion of the case.

H. ROBERT KOLTNOW &
GERALD KOGAN
Attorneys for Defendant
1201 Biscayne Building
Miami, Florida 33130

BY: Gerald Kogan

I HEREBY CERTIFY that a copy of the foregoing Motion for New Trial was mailed to B. PAUL PETTIE, JR., Assistant County Solicitor, 201 S. E. 6th Street, Ft. Lauderdale, Florida this 6th day of November, 1967.

Gerald Kogan
GERALD KOGAN

APPENDIX F

On the 21st day of November, 1967, excerpts from Court of Record Minute Book 183, Page 297, reciting the Order Denying Motion for New Trial in that cause styled STATE OF FLORIDA vs. MORT NORMAN KORAN, Case No. 66-10011, recorded in words and figures as follows:

". . . . Thereupon, the Defendant's Motion for New Trial was Denied as follows: It is

> Ordered and Adjudged that the Defendant's Motion for New Trial be, and the same is hereby Denied.

RAYMOND J. HARE,
Judge . . . ."

APPENDIX G

On the 21st day of November, 1967, excerpts from Court of Record Minute Book 183, Page 297, reciting the Sentencing in that cause styled STATE OF FLORIDA vs. MORT NORMAN KORAN, Case No. 66-10011, recorded in words and figures as follows:

". . . . This case being called for Sentencing, the Defendant was present in open Court with his Attorney, the Honorable Gerald Kogan. Sentence having been deferred on November 3, 1966, the Court proceeded as follows:

> What have you to say why sentence should not be imposed upon you? Saying nothing sufficient, it is
>
> The Judgment of the Court and the Sentence of the Law that you be imprisoned by confinement at hard labor in the State Prison for a term of eight (8) years; five (5) years of which sentence is to run concurrently with the sentence previously imposed in Federal Court in Dade County.
>
> RAYMOND J. HARE,
> Judge . . . ."

APPENDIX H

IN THE COURT OF RECORD, IN AND FOR BROWARD COUNTY, FLORIDA

NO. 66-10011

(Filed November 22, 1967)

STATE OF FLORIDA,

Plaintiff,

vs.

MORT NORMAN KORAN,

Defendant.

NOTICE OF APPEAL

NOTICE is hereby given that MORT NORMAN KORAN, Defendant, by his undersigned attorneys, hereby appeals to the Fourth District Court of Appeal of Florida, from the Final Judgment entered in this proceeding on the 3rd day of November, 1967, wherein the said Defendant was adjudicated guilty of the offense alleged in the Information herein, after a plea of not guilty to said Information and a Jury Trial, and was sentenced to a term of eight years (5 years concurrent with Federal). All parties to said cause are called upon to take notice of the entry of this appeal.

DATED this 21 day of November, 1967.

GERALD KOGAN and
H. ROBERT KOLTNOW
Attorneys for Defendant
1201 Biscayne Building
Miami, Florida 33130

BY /s/ GERALD KOGAN

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal was mailed to B. PAUL PETTIE, JR., Assistant County Solicitor, 201 S. E. 6th Street, Ft. Lauderdale, Florida this 21 day of November, 1967.

/s/ GERALD KOGAN

APPENDIX I

IN THE COURT OF RECORD, IN AND FOR BROWARD COUNTY, FLORIDA.

NO. 66-10011

STATE OF FLORIDA, *Plaintiff,*

vs.

MORT NORMAN KORAN, *Defendant.*

ASSIGNMENTS OF ERROR, DIRECTIONS TO CLERK, DESIGNATION OF NECESSARY PARTS OF TRANSCRIBED TESTIMONY

ASSIGNMENTS OF ERROR

The Defendant, by his undersigned attorneys, makes the following Assignments of Error upon which he will rely for reversal of the Verdict, Judgment and Sentence herein:

1. The Court erred in denying Defendant's Motion To Quash Information.

2. The Court erred in denying Defendant's Motion To Suppress Evidence taken as the result of an illegal search and seizure, and introduced against the Defendant in the Trial of this cause, including confessions, statements against interest, electronic recordings of telephone and other conversations, and all evidence taken from the Defendant's place of business in Hallandale, Florida.

3. The Court erred in denying Defendant's Motions for Directed Verdicts of Acquittal both at the close of the State's case and at the conclusion of the entire case.

4. The Court erred in denying Defendant's Motion for New Trial.

DIRECTIONS TO CLERK

Defendant, by his undersigned attorneys, as and for his Directions to the Clerk in making up the Transcript of Record On Appeal in this case, the following should be included:

1. Information
2. Plea of Defendant
3. Motion To Quash Information
4. Order Denying Motion To Quash Information (Minutes)
5. Motion To Suppress
6. Order Denying Motion To Suppress
7. Reporter's Transcript of Testimony on Motion To Suppress to be supplied later.
8. Reporter's Transcript of Testimony on Trial to be supplied later.
9. Verdict, Judgment and Sentence
10. Motion For New Trial
11. Order Denying Motion For New Trial (Minutes)
12. Notice of Appeal
13. These Assignments of Error and Directions to Clerk
14. All Exhibits introduced at Trial

DESIGNATION OF NECESSARY PARTS OF TRANSCRIBED TESTIMONY

Defendant, by his undersigned attorneys, as and for his Designation Of Necessary Parts Of Transcribed Testimony herein, directs that the entire Transcript of the Trial, omitting Voir Dire and Closing Arguments, together with a Transcript of the Testimony on the Motion To Suppress, be included as part of the original Record herein.

H. ROBERT KOLTNOW and
GERALD KOGAN
Attorneys for Defendant
1201 Biscayne Building
Miami, Florida 33130

BY /s/ H. ROBERT KOLTNOW

I HEREBY CERTIFY that a copy of the above Assignments Of Error, Directions To Clerk, Designation Of Necessary Parts Of Transcribed Testimony, was mailed to ANGELINE G. WEIR, County Solicitor, 201 S. E. 6th Street, Ft. Lauderdale, Florida, this 11th day of December, 1967.

/s/ H. ROBERT KOLTNOW

APPENDIX J

District Court of Appeal of Florida.
Fourth District.

Feb. 14, 1969.

No. 1835.

MORT NORMAN KORAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Rehearing Denied March 21, 1969.

PER CURIAM.

[1,2] Affirmed. The record discloses that defendant was sufficiently informed of his constitutional rights after being taken into custody and prior to interrogation, and that the defendant freely and intelligently gave unequivocal and specific consent to the search of his premises. The evidence obtained through such interrogation and search was properly admissible. The tape recording evidence obtained from the use of electronic transmitting and recording devices was not obtained in violation of any of defendant's constitutional rights nor was such evidence obtained in violation of any state or federal statute, and was therefore properly admitted. Miranda v. Arizona, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; Lopez v. United States, 1963, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462; Rathbun v. United States, 1957, 355 U.S.

107, 78 S.Ct. 161, 2 L.Ed.2d 134; On Lee v. United States, 1952, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270; Koran v. State, Fla. App.1968, 213 So.2d 735; Hajdu v. State, Fla. App.1966, 189 So.2d 230; Barber v. State, Fla.App.1965, 172 So.2d 857; Gomien v. State, Fla.App.1965, 172 So.2d 511.

WALDEN, C. J., and REED and OWEN, JJ., concur.

APPENDIX K

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA — FOURTH DISTRICT — JANUARY TERM 1969

CASE NO. 1835.

March 21, 1969.

MORT NORMAN KORAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ORDERED that appellant's petition for rehearing, filed March 3, 1969, is hereby denied.

A TRUE COPY
DISTRICT COURT OF APPEAL SEAL
/s/ Evelyn R. Flack
EVELYN R. FLACK
CLERK

cc: H. Robert Koltnow and Gerald Kogan, Esqs.
James M. Adams, Esq.

APPENDIX L

IN THE SUPREME COURT OF FLORIDA — JANUARY TERM, A. D. 1969 — MONDAY, JUNE 9, 1969

CASE NO. 38,489

MORTIMER NORMAN KORAN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

DISTRICT COURT OF APPEAL,
FOURTH DISTRICT

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

Supreme Court of Florida Seal

TEST:

/s/ Sid J. White
Sid J. White
Clerk Supreme Court.

CC: Hon. Evelyn R. Flack
Hon. W. B. DeMilly
Messrs. Gerald Kogan & H. Robert Koltnow
Hon. Earl Faircloth
Hon. James M. Adams, West Palm Beach

APPENDIX M

IN THE SUPREME COURT OF FLORIDA — JULY TERM, A. D. 1969 — FRIDAY, JULY 11, 1969

CASE NO. 38,489

MORTIMER NORMAN KORAN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

Petition for rehearing is hereby denied, and it is further ORDERED that petitioner's motion to stay mandate is granted and proceedings in this Court and in the lower courts are hereby stayed to and including August 11, 1969, to allow petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that court.

A True Copy

Supreme Court of Florida Seal

TEST:

/s/ Sid J. White
Sid J. White

Clerk Supreme Court.

cc: Messrs. Gerald Kogen and H. Robert Koltnow
Honorable Earl Faircloth
Honorable Evelyn R. Flack
Honorable W. B. DeMilly

APPENDIX N

District Court of Appeal of Florida.
Third District.

No. 67-1021.

Aug. 20, 1968.

MORTIMER NORMAN KORAN,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

Rehearing Denied Sept. 24, 1968.

Before BARKDULL, HENDRY and SWANN, JJ.

SWANN, Judge.

The defendant below, Mortimer Norman Koran, was charged by information in Dade County, Florida, with the unlawful possession of counterfeit driver's licenses in violation of Fla.Stat. § 322.212(1), F.S.A.

He was found guilty, by a jury, on June 20, 1967, and appeals from his judgment and sentence rendered November 30, 1967 for a term of three years in the state penitentiary.

His first point concerns an alleged violation of his constitutional rights by the introduction into evidence of certain tape recordings which were obtained by govern-

ment agents using electronics surveillance devices. The recorded conversations were played before the jury after their authenticity had been established.

A part of the tape recording, which was generally objected to by the defendant, had been obtained by an undercover agent, one Rivers, who was wired with a microphone and radio transmitter while conversing with the defendant concerning certain criminal activities. These conversations between the undercover agent and the defendant took place under a bridge in Dade County, Florida. They were transmitted to a building nearby where other agents recorded the conversations. The tape also consisted of a recording of several telephone conversations between the defendant and Rivers, and was used to corroborate the direct testimony of Rivers.

Appellant relies heavily on a recent decision of the United States Supreme Court. See Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), decided and released after the trial and judgment rendered in this case.

[1] In Florida, generally, sound recorded evidence of oral conversation is admissible into evidence provided that a satisfactory degree of authenticity has been achieved; Gomien v. State, Fla.App.1965, 172 So.2d 511, and where, as here, the person causing the recording to be made is the one whose actual testimony is sought to be corroborated by the recording. Hajdu v. State, Fla.App. 1966, 189 So.2d 230.

[2] The recording of the oral conversation between the agent Rivers and the defendant was taken with the

consent of one of the parties, Rivers. It was admissible under state law (Gomien and Hajdu, supra) and under federal law. Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963).

As Justice White, in his concurring opinion in Katz, supra, stated:

* * * * * *

> "In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police, Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); (2) by a recording device hidden on the person of such an informant, Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462, (1963); Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394, (1966); and (3) by a policeman listening to the secret microwave transmissions of an agent conversing with the defendant in another location, On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable, (or law-abiding) associates. Hoffa v. United States, supra. It is but a logical and reasonable extension of this principle that a man take the

> risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner 'sought to exclude * * * the uninvited ear,' and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening." [Id, 88 S.Ct. 517, 19 L.Ed.2d 589]

* * * * * *

The admissibility into evidence of the recorded telephone conversations between the undercover agent and the defendant brings into play a separate and distinct set of rules in our opinion. Formerly the federal law generally required that such evidence must be suppressed, upon proper motion, in federal courts but not in state courts. Schwartz v. State of Texas, 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231 (1952).

In Katz, supra, the U.S. Supreme Court overruled its earlier decisions of Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376 (1928) and Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942). It announced that a defendant in federal court charged with violation of a federal statute was protected by the Fourth Amendment to the Federal Constitution and that his federal constitutional rights were violated by the actions of F.B.I. agents in attaching an electronic listening device to a public telephone booth and introducing a recording of such private conversations into evidence over proper objections.

In the instant case one of the parties to the recorded telephone conversations consented to the recording and permitted a recording device to be attached to the telephone. This distinguishes the facts herein from Katz, supra. See Griffith v. State, Fla.App.1959, 111 So.2d 282; and Barber v. State, Fla.App.1965, 172 So.2d 857.

[3] The defendant in the instant cause made no specific objections in the trial court that the introduction of these tape recordings into evidence violated *his constitutional rights.* Generally, specific objections to the introduction of evidence must be raised in the court below in order to be properly considered on appeal.

Since specific objections on these grounds were not raised by the defendant in the court below, and since there is no judicial authority for applying Katz retroactively, and inasmuch as there has been no adjudication that Katz applies in state courts, we reject as untimely and unsound defendant's first point for reversal. Parenthetically, we note that no specific objection was made by the defendant to the introduction of the telephone recording on the ground that it violated any federal or state statute. See Lee v. State, 392 U.S. 378, 88 S.Ct. 2096, 20 L.Ed.2d 1166 (U.S. June 17, 1968).

[4] Defendant contends that the trial court erred in permitting references in the opening statement of the prosecution to other collateral offenses allegedly committed by him. This argument is without merit under the circumstances herein. Williams v. State, Fla.1959, 110 So.2d 654; Winkfield v. State, Fla.App.1968, 209 So.2d 468.

[5] Lastly, the defendant seeks reversal because the trial court permitted a Florida Highway Patrolman to qualify as an expert and give his opinion as to the counterfeit driver's licenses. This objection is not substantiated by the record on appeal and no abuse of discretion was committed by the trial judge. See Florala Saw Mill Co. v. Smith, 55 Fla. 447, 46 So. 332 (1908); Florida East Coast Ry. Co. v. Lassiter, 59 Fla. 246, 52 So. 975 (1910).

The judgment herein appealed is, therefore,

Affirmed.

APPENDIX O

United States Court of Appeals Fifth Circuit.

No. 25446.

Jan. 27, 1969.

MORTIMER NORMAN KORAN,

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

Rehearing and Rehearing En Banc Denied March 28, 1969.

Before GEWIN and BELL, Circuit Judges, and BOOTLE, District Judge.

GEWIN, Circuit Judge:

Mortimer Norman Koran was convicted in the United States District Court for the Southern District of Florida on Counts Three and Five of an indictment charging substantive offenses relating to counterfeit currency.[1] Count

---

[1]The pertinent parts of the statute, 18 U.S.C. § 474 (1964), provide respectively:

> Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or
>
> Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

The jury returned a verdict of "not guilty" on three additional counts.

Three charged Koran with printing a one dollar silver certificate and Count Five charged him with possession of the certificate. He was sentenced to five years imprisonment on each count, the sentences to run concurrently. We affirm the judgment of conviction.

Appellant Koran urges that his fourth amendment rights were violated by the introduction at his trial of evidence obtained through the use of electronic listening and recording devices. The evidence challenged consisted of (1) the testimony of an investigator, (2) the tape recordings of certain telephone conversations, and (3) the tape recordings of certain non-telephonic conversations. The investigator, Secret Service Agent Rivers, testified that he overheard a conversation between the appellant and a government informer, Schatzabel, in which the appellant discussed plans for printing a large quantity of counterfeit currency. The conversation took place in the appellant's printing establishment while Agent Rivers, stationed a short distance away, listened to the conversation over a radio which received transmissions from a device concealed in Schatzabel's shirt pocket. The tapes of telephone conversations which were received in evidence were recordings of communications between the appellant and Schatzabel and between the appellant and Agent Rivers, who acted incognito as a prospective buyer of counterfeit merchandise. These conversations were recorded by a device attached to the telephone used by Schatzabel and Rivers, both of whom consented to the recording of the conversations. The non-telephonic tapes were recordings of two conversations between Agent Rivers and appellant Koran which took place beneath a bridge. On both occasions, Rivers was equipped with a transmitter when he met with the appellant. The conversations were recorded by another agent who was posted nearby.

Prior decisions of this court, as well as decisions of the Supreme Court, have approved the use of evidence obtained by the methods employed in this case.[2] The appellant contends, however, that the Supreme Court in *Katz v. United States*[3] charted a new course which demands disapproval of such investigative techniques. He points particularly to the Court's pronouncement in *Katz* that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[4] The appellant asserts that, since he was unaware of the presence of electronic listening and recording devices, he did not *knowingly* expose to the public his private conversation.

This court has previously concluded that *Katz* leaves undisturbed the established law applicable to the methods of investigation employed in this case.[5] And in a recent opinion, the Tenth Circuit reached the same conclusion,[6]

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[2]Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); On Lee v. United States, 343 U.S. 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952); Harris v. United States, 400 F.2d 264 (5th Cir. 1968); Handsford v. United States, 390 F.2d 373 (5th Cir. 1968); Dryden v. United States, 391 F.2d 214 (5th Cir. 1968); Dancy v. United States, 390 F.2d 370 (5th Cir. 1968); Beatty v. United States, 377 F.2d 181 (5th Cir.), *rev'd on other grounds*, 389 U.S. 45, 88 S.Ct. 234, 19 L.Ed.2d 48 (1967); Hurst v. United States, 370 F.2d 161 (5th Cir. 1967).

[3]389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

[4]389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d at 582.

[5]Dryden v. United States, 391 F.2d 214, 215 (5th Cir. 1968); Dancy v. United States, 390 F.2d 370, 371 (5th Cir. 1968); Long v. United States, 387 F.2d 377, 378 n. 1 (5th Cir. 1967). *See* Harris v. United States, 400 F.2d 264 (5th Cir. 1968); Handsford v. United States, 390 F.2d 373 (5th Cir. 1968).

[6]Holt v. United States, 404 F.2d 914 (10th Cir. 1968).

emphasizing the language of Mr. Justice White's concurrence in *Katz:*

> When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. . . . It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another.[7]

Government agents in *Katz* had attached electronic listening equipment to the top of a telephone booth. When the defendant used the booth in making calls, the agents overheard his end of the conversations. The Supreme Court held that, since the search did not comply with constitutional standards, the evidence of the conversations was not admissible.

[1] The attempt to equate the case *sub judice* with *Katz* must fail. It is true that appellant Koran did not wish to expose his words to the public. However, this fact alone does not suffice, for no criminal desires public exposure of his surreptitious activity. The crucial fact here is that the appellant knowingly took the risk that his conversants might expose his statements. Therefore, he cannot now complain that his conversants did in fact expose the conversations. In *Katz*, on the other hand, exposure of the defendant's private conversation was unaided by his conversant. Instead, exposure resulted from circumstances unrelated to the risk which the defendant

[7] 389 U.S. at 363 n. 1, 88 S.Ct. at 517, 19 L.Ed.2d at 589 n. 1.

knowingly took when he spoke to his conversant. Thus we think it clear that the appellant's reliance upon *Katz* is misplaced.[8]

[2] The appellant argues that Agent Rivers' testimony relating to the conversation he overhead between the appellant and Schatzabel as they talked in the appellant's shop was nevertheless improper because it was unsupported by testimony from Schatzabel, who did not testify. This contention is without merit. The absence of supporting testimony from Schatzabel would have significance only if there existed a complete lack of evidence identifying the appellant as the party with whom Schatzabel conversed. Although Agent Rivers from his listening post could not visually observe the participants in the conversation, the record establishes beyond dispute that the appellant was one of the parties.

[3] The statute which the appellant was convicted of violating proscribes the printing of currency and the possession of counterfeit currency "except under authority from the Secretary of the Treasury or other proper officer."[9] The appellant contends that the Government did not prove his lack of authority and, therefore, failed to prove all the elements of the offense charged. While the Government offered no direct proof of the appellant's lack of

---

[8]We are, of course, aware that our analysis of *Katz* is in conflict with a Seventh Circuit decision. In United States v. White (7th Cir. 1968), *upheld on rehearing en banc*, 405 F.2d 838 (7th Cir. 1969), the court held that mere existence of the need to use informers and secret devices to obtain information from a defendant is a clear indication that the defendant seeks to exclude the uninvited ear and, consequently, that this method of investigation violates the defendant's fourth amendment rights. As indicated by our discussion, we do not believe the reach of *Katz* extends so far as the Seventh Circuit suggests.

[9]See note 1 *supra*.

authority, it did present evidence from which the jury could reasonably infer that he had no authority.[10] Agent Rivers, for example, testified:

> He [the appellant] indicated to me he had something to [show] me and I said well, let me look at it. He said, well, I'm not going to show it to you out here in the open.
>
> I says well, let me look at it. So he handed it to me and I opened it up and it was a $1.00 Silver Certificate oversized.
>
> Q Did you have any conversations with him regarding that $1.00 Silver Certificate that he handed you on that occasion?
> A Yes. He indicated I should get in the car with him to look at this thing in private, which I did.
>
> He stated that he had this at home and he had made it the night before and said he made it oversized just to show its detail which would prove his being a good printer.

If the jury believed the broad thrust of the testimony of the witnesses—which it obviously did—the inference was compelled that the appellant had no authority to print currency or to possess counterfeit currency.

---

[10]Since we conclude that the Government presented sufficient evidence to support a finding that the appellant lacked authority, we do not reach the question raised in the briefs of whether proving lack of authority is a burden carried by the Government of a defense which the defendant must raise.

[4-6] Appellant Koran next contends that the trial court erred in permitting references during the prosecutor's opening statement and in the evidence throughout the trial to the appellant's unlawful printing of title certificates and driver's licenses as a part of the same venture which produced the counterfeit currency. Generally, evidence of crimes not charged in the indictment is inadmissible. However, we believe that the evidence in question falls within a widely recognized exception to the general rule which permits such evidence if it tends to prove a common scheme, plan or design on the part of the defendant so closely related to the offense charged that it may serve to establish the offense or to establish an intent in the mind of the accused to commit the offense.[11]

[7] The prosecutor, in his opening statement, also made reference to the appellant's *arrest* for counterfeiting title certificates and driver's licenses. In response the appellant moved for a mistrial. The court denied his motion but offered to instruct the jury to disregard the prosecutor's comment; defense counsel, however, preferred not to have the instruction. The appellant contends that a mistrial was mandatory. We think, however, that the court was clearly within the bounds of its discretion in denying the motion.

[8] The appellant makes one contention which is relevant only to his conviction on Count Five of the indictment, the possession count. The statute under which he was convicted makes unlawful the possession of a counterfeit obligation which is after the similitude of an obligation of the United States. The appellant argues that

---

[11]Pardo v. United States, 369 F.2d 922, 924 (5th Cir. 1966); Robinson v. United States, 366 F.2d 575, 578 (10th Cir. 1966).

the oversized silver certificate which he is convicted of possessing was not "after the similitude" of a United States silver certificate.[12] However, it is unnecessary for us to reach this contention since the sentences under both counts run concurrently and since we have concluded that the conviction under the printing count is free of error.[13]

The judgment is affirmed.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

---

[12]See note 1 *supra*. The statute makes unlawful the *printing* of anything "in the likeness" of an obligation of the United States, without reference to "similitude." The appellant has not raised the likeness question but, even if he had, it would have been to no avail.

> The legislative purpose is clear that Congress intended, in protecting the currency, to tolerate no manipulation in the making of impressions of government obligations or securities, whether the copies or impressions might be good or bad, and regardless of the purpose for which they might be made. . . .
> [T]here is no need of proof that such impressions were calculated to deceive.

Webb v. United States, 216 F.2d 151, 152 (6th Cir. 1954).

[13]Hirabayashi v. United States, 320 U.S. 81, 85, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943); Mishan v. United States, 345 F.2d 790, 791 (5th Cir. 1965). Whether the "concurrent sentence" doctrine enunciated in *Hirabayashi* has continuing validity in light of subsequent decisions will be argued before the Supreme Court on March 24, 1969. See Benton v. Maryland, 393 U.S. 994, 89 S.Ct. 481, 21 L.Ed.2d 460 (1968).

SUPREME COURT, U. S.

FILED

FEB 4 1970

JOHN F. DAVIS, CLERK

in the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

NO. [redacted] 50

MORTIMER NORMAN KORAN,

Petitioner

-

v.

STATE OF FLORIDA,

Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

EARL FAIRCLOTH
Attorney General
Tallahassee, Florida

JAMES M. ADAMS
Assistant Attorney General
321 Pan-American Building
West Palm Beach, Florida 33401

Counsel for Respondent

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STATEMENT OF THE CASE

Respondent will accept the Statement of the Case as set forth Petitioner's brief as being essentially correct.

QUESTIONS PRESENTED

QUESTION ONE

THROUGH THE ELECTRONIC SURVEILANCE OF PETITIONER OCCURRED PRIOR TO THE DECISION IN KATZ V UNITED STATES ON DECEMBER 18, 1967, DID THE INTRODUCTION INTO EVIDENCE OF TAPE RECORDINGS OF ORAL AND TELEPHONE CONVERSATIONS OF PETITIONER, WHEN PETITIONER ELECTED NOT TO TESTIFY AT HIS TRIAL, CONSTITUTE A VIOLATION OF HIS RIGHTS UNDER BOTH THE FOURTH AND FIFTH AMENDMENTS?

ARGUMENT

Petitioner here contends that the precedents established in **Lee v Florida,** 392 US 378 (1968) and **Katz v United States.** 389 US 347 (1967) would require that his conviction be set aside. Petitioner does recognize that the effect of these decisions has been held to be prospective only in **Fuller v Alaska,** 383 US 80 (1969) and **Desist v United States,** 394 US 244 (1969). Respondent contends that these latter cases are controlling on the issue presented herein and that there is no reason to deviate from the holdings in **Fuller** and **Desist,** supra.

Respondent would show however that **Lee v Florida,** supra would not require that this conviction be set aside even if applied retrospectively. The **Lee** case involved an electronic

listening device which was attached to a party line in such a way that all telephone conversations over this particular line were recorded. In the instant case, the only conversations which were recorded were those between two specific individuals, one an under cover agent, and the recording was merely the best evidence of the fact that such conversations took place (R 78-103).

The same factual distinctions demonstrate that Petitioner is in error in contending that **Katz v United States,** supra, would be applicable if applied retrospectively. **Katz** involves an electronic listening device located in such a way that it would record all telephone conversations taking place within a telephone booth. Here, no geographical area, however small, was the subject of blanket recording of all conversations within that area.

Berger v New York, 388 US 41 (1967) cited by Petitioner is likewise factually dissimilar. **Berger** involved the installation of a recording device in an office for a period of 60 days, within which time all conversations within this office were subject to being recorded.

The factual circumstances of this case place it within the rule of **Lopez v United States,** 373 US 427 (1963), wherein this Court held as follows:

> "A wire recording of a conversation of a federal internal revenue agent and a defendant in the latter's office is admissable at defendant's trial on a charge of attempted bribery of the agent, where the recording device was used only to obtain the most reliable evidence possible of the conversation . . . and the

> device was not planted by means of an unlawful invasion of defendant's premises . . . but was carried in and out by agent who was there with defendant's consent."

Florida Courts followed the **Lopez** holding in **Gomian v State,** 172 So.2d 511 (1965) and **Hajdu v State,** 189 So.2d 230 (1966), both of which are similar to the instant case.

Petitioner's argument that the use of this recording of the conversation between himself and an informer indicates an "unfair" trial overlooks the overwhelming evidence of guilt in the record. This recording was merely corroborative of the eye witness testimony of Agent Rivers (R77-103), Sergeant Hardin (R115-141), Agent Chalfont (R141-144), Agent Lindsay (R149-152), and Sergeant Brady (R162-195).

For these reasons, we respectfully submit that Petitioner contentions on this issue are without merit.

QUESTION TWO

DID THE ADMISSION INTO EVIDENCE OF THE FRUITS OF A WARRANTLESS SEARCH, NOT INCIDENTAL TO THE ARREST, BASED ON A CONSENT BY PETITIONER DURING CUSTODIAL INTERROGATION, WHEN PETITIONER WAS NOT ADVISED OF HIS RIGHT TO CONSULT WITH AN ATTORNEY PRIOR TO GIVING SUCH CONSENT, VIOLATE PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT?

ARGUMENT

This issue raised by Petitioner here is whether the warnings given by law enforcement officials were within constitutionally accepted standards, particularly with reference to his consent to a warrantless search of his place of business.

We do not take issue with the point of law here raised by Petitioner; we simply contend that the factual circumstances clearly show a voluntary, knowing, intelligent waiver by Petitioner.

To begin with, there certainly was ample evidence available at the time of Petitioner's arrest to make the obtaining of a search warrant a mere formality. The facts known to the police authorities has been refered to in the preceding question. No warrant was obtained because Petitioner signed a written waiver of search warrant.

Prior to any search, Petitioner was fully advised of his constitutional rights by Agent Rivers (R95), Sgt. Hardin (R117), Agent Lindsay (R152), and Sgt. Brady (R163, 164).

Sgt. Hardin testified as follows (R127):

> "I advised him again that he didn't have to answer any questions or make any statements, and I strongly suggested he call his attorney; and he made three phone calls, and he told me he was calling a real estate attorney. He told me he was calling an attorney who helped him purchase his house, and in my own mind I thought it would be a real estate attorney. So after he made his phone calls we went

> into the back office, and I asked him if this was the printing press he used to print the driver's licenses on. He said, 'you won't find anything on that. I scrubbed the blanket off with alcohol,' and I didn't know what the blanket was. I asked him what was the blanket, and he pointed to a section of the machine."

The voluntariness of Petitioner's waiver is further shown by this testimony of Sergeant Brady (R164,165):

"A Well, I talked to Mr. Koran, and he didn't have a whole lot to say, and I asked him did he have any objections to a search of his automobile, his home, and his printing shop in Hallandale; and he said, 'No,' and I said, 'Would you sign a waiver of search?' So I read the waiver of search to him, and at this time Sergeant Hardin of the Miami Police Department was standing right there, and he made a point of telling Mr. Koran that he did not have to submit to a search. He agreed to a search and signed the waiver of search—three of them, in fact—one for his home, one for his automobile, and one for his shop. However, we did not execute the one on his home because of his ill mother."

Other pertinent testimony is found in the Record

at page 194,195:

> "Q. Did Sergeant Hardin advise him of his rights back there at the power station?
>
> A. Yes, I advised him of his rights. Keith Hardin was standing right next to me, and after I had advised

him of his rights, Keith made an effort to point out—and he used this manner—he pointed to Mr. Koran. He said, 'Now, Mort, do you really understand that you do not have to submit to a search?' He said, 'Yes, yes, I have been around.' "

We respectfully submit that the record herein reveals that Petitioner had full and complete warnings of his constitutional rights and that he voluntarily, knowingly and intelligently waived a search warrant.

CONCLUSION

Respondent respectfully submits that none of the issues raised by Petitioner justify the issuance of a Writ of Certiorari and that the judgment and sentence of the trial court should not be disturbed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District, has been furnished Honorable H. Robert Koltnow, 1201 Biscayne Building, 19 West Flagler Street, Miami, Florida, this____day of _____, 1970.

_____

JAMES M. ADAMS

of Counsel